

These are the tentative rulings for civil law and motion matters set for Thursday, March 29, 2012, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Wednesday, March 28, 2012. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

1. M-CV-0043914 Brockman, Ellen vs. Melvin, Jennifer Mae

The Motion to Set Aside Default Judgment is dropped. No moving papers were filed with the court.

2. M-CV-0050390 Midland Funding LLC vs. Eller, Justin

Plaintiff's Unopposed Motion to Compel Discovery and Deem Facts Admitted is granted. The Defendant shall provide verified responses and responsive documents, without objections, on or before April 20, 2012. The matters encompassed in Plaintiff's Requests for Admissions, Set One are deemed admitted.

Sanctions are denied because the motion was not opposed. (Code Civ. Proc. § 2030.290(c); 2031.300(c).) Although California Rule of Court, Rule 3.1348(a) purports to authorize sanctions if a motion is unopposed, the Court declines to do so, as the specific statute governing this discovery authorizes sanctions only if the motion was unsuccessfully made or opposed. Any order imposing sanctions under the California Rules of Court must conform to the conditions of one or more of the statutes authorizing sanctions. (*Trans-Action Commercial Investors, Ltd. v. Firmaterr Inc.* (1997) 60 Cal.App.4th 352, 355.) However, repeated conduct of failing to comply with discovery obligations may lead the Court to find an abuse of the discovery process and award sanctions on that basis. (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481.)

3. M-CV-0050432 Capital One Bank USA, N.A. vs. Rees, Janet R.

The Unopposed Motion for Judgment on the Pleadings is granted pursuant to CCP §438. Judgment is entered forthwith against Defendant in the amount of \$11,442.22 in damages, \$350.00 in attorney's fees, \$506.00 in costs, and \$502.62 in prejudgment interest at per annum rate of 3.99 percent for a total judgment of \$12,800.84.

4. M-CV-0053113 Discover Bank vs. Smith, Marcia A.

The Unopposed Motion for Judgment on the Pleadings is granted pursuant to CCP §438. Judgment is entered forthwith against Defendant in the amount of \$15,099.76 in damages and \$472.50 in costs for a total judgment of \$15,572.26.

5. M-CV-0053532 Federal National Mortgage Ass'n vs. Valle, J. Heriberto

Appearance Required on Defendant's Motion to Set Aside Default Judgment.

6. S-CV-0018066 Newland, Bruce & Jenny vs. The Progressive Corporation

The Motion for Summary Judgment and Further Proceedings after Appellate Opinion are continued to April 17, 2012 at 8:30 a.m. in Department 32 to be heard by the Honorable Colleen M. Nichols.

7. S-CV-0024983 J.E. Robert Company, Inc. vs. Eureka Ridge, LLC. et al

Defendants' Motion to Remove the Receiver is denied.

The Receiver's objections Nos. 1-3, 5-22 are overruled. The Receiver's objection No. 4 is sustained.

The Defendants' request for oral evidence is denied.

The court takes judicial notice of Eureka Ridge v. First American Title, SCV-30730, including the items stated in Plaintiff's request for judicial notice.

The application for appointment of the Montague & Viglioni firm as receiver's counsel is granted. The appointment is retroactive to August 25, 2009 and the court confirms the prior retention of the Montague & Viglioni firm. (*Maggiora v. Palo Alto Inn, Inc.* (1967) 249 Cal.App.2d 706, 713; *People v. Riverside University* (1973) 35 Cal.App.3d 572.)

The court has the authority to remove or discharge a receiver. (*Hozz v. Varga* (1959) 166 Cal.App.2d 539, 544.) The receiver's powers are derived from the direction given by the court in the order for appointment. (CCP §568.) Defendants have failed to show any wrongdoing on the part of the receiver that warrants his removal. The court finds that the receiver has acted in good faith and his actions were done to benefit the receivership estate. As such, the motion is denied.

8. S-CV-0026786 Reserves at the Galleria Owners Assoc. vs. Galleria Condo

The Motion to Compel is dropped at the request of the moving party.

9. S-CV-0026932 Rivera, Ron vs. Rivera, Lidia

The Motion to Amend the Complaint is dropped. No moving papers were filed with the court.

10. S-CV-0027932 Maria Montessori Charter Acad vs. Rocklin Un. School Dist

Defendant's Demurrer to Plaintiff's Verified Answer to the First Amended Cross-Complaint is dropped. A Second Amended Verified Answer to the First Amended Cross-Complaint was filed on March 22, 2012.

Defendant's Demurrer and Motion to Strike Plaintiff's Cross-Complaint are dropped. A First Amended Cross-Complaint was filed on March 27, 2012.

11. S-CV-0029010 Jain, Roshan D., et al vs. Radstone, Graham Michael

Defendant's Demurrer to the First Amended Complaint (FAC) is sustained with leave to amend.

A party may demur to a complaint where the pleading does not state facts sufficient to constitute a cause of action. (Code of Civil Procedure §430.10(e).) A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787.) As such, the allegations in the pleadings are deemed to be true no matter how improbable the allegations may seem. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.)

Plaintiffs assert four (4) causes of action arising from a dispute over real property. An essential element for each of cause action is the ability to establish the existence of a trust. The establishment of a trust provides the Plaintiffs both standing and the basis for raising the causes of action for breach of trust, breach of fiduciary duty, imposition of constructive trust, and establishment of a resulting trust.

In order to plead the essential elements of a trust, the plaintiff must state sufficient facts showing trust intent, trust property, trust purpose, and a beneficiary. (Probate Code §§15201-25305.) In this case, the FAC fails to state sufficient facts regarding the trust intent, the trust purpose, and the beneficiary or beneficiaries of the trust. All four of Plaintiffs' causes of action fail since the overarching establishment of the trust has not been sufficiently pled in the FAC.

Plaintiffs bear the burden of demonstrating how the FAC may be amended to cure the defects therein. (*Assoc. of Comm. Org. for Reform Now v. Dept. of Indus. Relations* (1995) 41 Cal.App.4th 298, 302.) A review of the FAC and the Plaintiffs' opposition reveals that an amendment may cure the deficiencies in the FAC. Any second amended complaint shall be filed and served on or before April 20, 2012.

If oral argument is requested, the parties' requests for telephonic appearances are granted. The court will contact both counsel at the time the matter is called for hearing.

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12. S-CV-0029106 Uldricks, Jeffrey L. vs. Blye, Judy C., et al

Appearance required on Geoffrey O. Evers' Motion to be Relieved as Counsel. Counsel is reminded that Local Rule 20.2.3 requires that notice of the court's tentative ruling procedure is required to be included in the notice of motion.

The unopposed motion is provisionally granted, subject to submission of a proof of service compliant to the court's order of March 13, 2012. The order will be effective upon its service on defendants and all counsel who have appeared in the action.

13. S-CV-0029262 Karr, William G. vs. Leep, Inc. et.al.

Defendants' Demurrer to the Complaint is sustained with leave to amend.

Plaintiff asserts three (3) causes of action arising from a consultation agreement. Defendants demur to all three causes of action. A party may demur a complaint where the pleading does not state facts sufficient to constitute a cause of action. (Code of Civil Procedure §430.10(e).) "A demurrer based on a statute of limitations is appropriate if the ground appears on the face of the complaint or from matters of which the court may or must take judicial notice." (*Aaronoff v. Martinez-Seftner* (2006) 136 Cal.App.4th 910, 918.)

Causes of action for breach of contract and breach of implied covenant of good faith and fair dealings have four-year statute of limitations. (CCP§337(1).) A fraud cause of action has a three-year statute of limitations. (CCP§338(d).) In a fraud action the plaintiff must show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence to rely upon delayed discovery. (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal. 4th 797, 808.) Plaintiff fails to allege sufficient facts showing that any of the three causes of action are not barred by the statute of limitations.

Plaintiff bears the burden of demonstrating how the complaint may be amended to cure the defects therein. (*Assoc. of Comm. Org. for Reform Now v. Dept. of Indus. Relations* (1995) 41 Cal.App.4th 298, 302.) While Plaintiff submits documentary evidence that is inappropriate for consideration as to the demurrer, it does demonstrate an ability to cure the defects in the complaint.

Any first amended complaint shall be filed and served on or before April 20, 2012.

In light of the court's ruling on the demurrer, the motion to strike is dropped as moot.

14. S-CV-0029416 Blackwell, Eva, et al vs. Aronson, Shirley Jo Ann, et al

The Motion to Compel re Subpoena is dropped. No moving papers were filed with the court.

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15. S-CV-0029446 Mt. Hawley Insurance Co. vs. Admiral Insurance Company

This tentative ruling is issued by the Honorable Charles D. Wachob. If oral argument is requested, such argument shall be heard on March 29, 2012, at 8:30 a.m. in Department 42:

Real Party In Interest Habitat Construction, Inc.'s Motion for Protective Order to Prevent Disclosure of Attorney-Client Privileged and Attorney Work Product Protected Legal Billings

After reviewing the moving papers, opposition, and reply papers, the court continues the matter to April 26, 2012 at 8:30 a.m. in Department 42 to afford counsel for Habitat Construction, Inc. an opportunity to submit further evidence to support its position that the attorney billing records contain attorney work product and/or attorney-client communications. Counsel for Habitat Construction, Inc. may file such supplemental briefing and declarations on or before April 6, 2012. Any responsive supplemental briefing may be filed on or before April 13, 2012. Moreover, the parties are to submit further declarations regarding their attempts to meet and confer to resolve the dispute on or before April 20, 2012.

16. S-CV-0029524 Carver, Ronald vs. Sutter Roseville Medical Ctr., et al

Plaintiff's Motion to Compel Further Responses to Contention Interrogatories is denied as the moving papers do not comport with the requirements of California Rules of Court, Rule 3.1345 as there is no separate statement provided with the motion. Even if the court were to address the substance of the motion, the result would be the same: the form of the contention interrogatories does not comply with CCP§2030.060(d) as each interrogatory is not "full and complete in and of itself." The purpose of contention interrogatories is to allow the propounding party the opportunity to learn of the contentions asserted by the responding party in a manner that is tailored by the propounding party. Here, Plaintiff presents 90 contention interrogatories that do not lead with any contentions. As drafted, the interrogatories are difficult to discern or respond to.

The sanctions requests of both parties are denied.

17. S-CV-0029596 Smith, Gregory, et al vs. Quality Loan Service Corp, et al

Defendants' Demurrer and Motion to Strike are dropped. A first amended complaint was filed on March 27, 2012.

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Plaintiff's Motion for Order Sealing Records

Plaintiff's Motion for Order Sealing Records of Alleged Trade Secrets is granted. Court records are presumed to be open to the public unless their confidentiality is required by law. (California Rules of Court, Rule 2.550(c).) The court may order a record be filed under seal upon express findings of fact that establish: (1) an overriding interest that overcomes the public's right to access, (2) an overriding interest supporting sealing the record, (3) a substantial probability that the overriding interest will be prejudiced if the record is not sealed, (4) the sealing of the record is narrowly tailored, and (5) there are no less restrictive means to achieve the overriding interest. (California Rules of Court, Rule 2.550(d).)

Plaintiff wishes to seal several areas within its preliminary injunction moving papers. The Onstott declaration states that the information deals with confidential trade secrets regarding service routes, client identities, and client contact information. (Onstott Declaration ¶4.) The court finds that such information is recognized as an overriding interest that overcomes the right to public access to the record and supports sealing of the record. (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1222, fn. 46.) The court also finds that there is a substantial probability that this overriding interest will be prejudiced if the information is not sealed. Further, the court finds that the moving party has shown that sealing portions of Memorandum of Points and Authorities in Support of the Preliminary Injunction, supporting Declarations, and supporting Exhibits are narrowly tailored and the least restrictive means to achieve the overriding interest. As such, the court orders that the portions outlined on page 4 of Plaintiff's Memorandum of Points and Authorities in Support of this motion be filed under seal.

The court notes that the redacted versions of the aforementioned documents were filed February 29, 2012. These moving papers shall remain filed and accessible to the public. The court further notes that any person may make a motion to unseal the documents in accordance with California Rules of Court, Rule 2.551(h).

Plaintiff's Motion for Preliminary Injunction

Plaintiff's Motion for Preliminary Injunction is denied. When determining whether to issue a preliminary injunction, the court weighs the likelihood of whether the moving party will prevail on the merits and the relative interim harm to the parties from the issuance or non-issuance of the injunction. (*Hunt v. Superior Court* (1999) 21 Cal.4th 983, 999-1000.) The ruling is within the sound discretion of the trial court. (*Ibid.*)

Plaintiff has not shown the relative interim harm it will suffer if the injunction is not issued by the court. Plaintiff submits a list of 19 clients that changed services after Defendant Zachary Burrows was fired from his employment with Plaintiff. (Kalsbeek Declaration ¶19.) However, Defendants submit 11 declarations that encompass almost all of the 19 accounts, which reiterate the same position: Each sought out Defendant Zachary Burrows due to the good will he had personally developed with each customer. (Lanman Declaration Exhibits 2-12.) Plaintiff has presented no further evidence to

support claims that Defendants have solicited any clients on the route lists. Nor has Plaintiff submitted additional evidence that the Defendants are interfering with any business relationships. Furthermore, Plaintiff admits that the overall effect of the misappropriation is difficult to quantify. (Plaintiff's Points and Authorities, p. 15:5-7.)

Plaintiff also fails to submit evidence that Defendants have any additional misappropriated information in their possession. Nor is there any evidence to support an order that Defendants submit a declaration stating they have no such information in their possession. As such, the motion is denied.

19. S-CV-0030304 Jeffrey Doyle vs. Bank of America, N.A., et al

Plaintiff's OSC Re Preliminary Injunction and Defendants' Demurrer to the Complaint are continued to April 12, 2012 at 8:30 a.m. in Department 40. The court is informed that the parties are attempting to settle the matter. The temporary orders are extended and the application is continued to the April 12, 2012 hearing date.

20. S-CV-0030341 Miller, Herbert E. vs. JP Morgan Chase Bank, N.A., et al

Plaintiff's OSC re Preliminary Injunction is dropped pursuant to the Stipulation and Order entered on March 22, 2012.

21. S-CV-0030382 Zirelli, Louis vs. Bank of America, N.A., et al.

Defendants' Demurrer to the Complaint is continued to April 17, 2012 at 8:30 a.m. in Department 32 to be heard by the Honorable Colleen M. Nichols.

22. S-CV-0030520 Silverton, John M.D., et al vs. Ronsonet, Cory I., et al

Defendant Martin Curle's Unopposed Demurrer to the First Amended Complaint is sustained.

Plaintiffs assert five (5) causes of action arising out of a dispute over a real estate appraisal. Defendant demurs only the fourth and fifth causes of action for professional negligence and negligent misrepresentation. A party may file a demurrer to a complaint where the pleading does not state facts sufficient to constitute a cause of action. (Code of Civil Procedure section 430.10(e).) A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Picton v. Anderson Union High School* (1996) 50 Cal.App.4th 726, 733.) As such, all properly pled facts are assumed to be true as well as those that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Here, Plaintiffs fail to state sufficient facts to support these two causes of action as to the moving Defendant.

The deficiencies in each cause of action are as follows:

4th Cause of Action – Professional Negligence: A claim for professional negligence specifically incorporates the standard of care into the elements of negligence requiring a showing that (1) there is a duty of the professional to use the skill, prudence and diligence as other members of his/her profession commonly possess and exercise, (2) a breach of

that duty, (3) a proximate causal connection between the negligent conduct and the injury, and (4) damages resulting from the professional negligence. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1077.) This cause of action has been extended to apply to real estate appraisers. (*Sodenberg v. McKinney* (1996) 44 Cal.App.4th 1760; *Thomson v. Canyon* (2011) 198 Cal.App.4th 594.) Plaintiffs are unable to allege that the moving Defendant has a duty since a real estate appraiser only owes a professional duty to the party that contracted for his or her services. (*Michelson v. Camp* (1999) 72 Cal.App.4th 955, 963; *Sodenberg, supra*, at p. 1768; *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370.) As such, the demurrer is sustained as to the fourth cause of action for professional negligence without leave to amend.

5th Cause of Action – Negligent Misrepresentation: “ ‘The elements of negligent misrepresentation are (1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage.’ [Citations omitted.] While there is some conflict in the case law discussing the precise degree of particularity required in the pleading of a claim for negligent misrepresentation, there is a consensus that the causal elements, particularly the allegations of reliance, must be specifically pleaded. [Citations omitted.]” (*National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc.* (2009) 171 Cal. App. 4th 35, 50.) Plaintiffs fail to allege sufficient facts supporting their positions as a viable third party who would be known to reasonably rely upon the Defendant’s appraisal. (*Sodenberg v. McKinney* (1996) 44 Cal.App.4th 1760.) As such, the demurrer to the fifth cause of action for negligent misrepresentation is sustained with leave to amend.

The court presumes the facts alleged in the FAC and in the moving papers state the strongest case for the Plaintiff. (see *Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1286.) Plaintiffs bear the burden of demonstrating how the complaint may be amended to cure the defects therein. (*Assoc. of Comm. Org. for Reform Now v. Dept. of Indus. Relations* (1995) 41 Cal.App.4th 298, 302.) A demurrer will be sustained without leave to amend absent a showing by plaintiff that a reasonable possibility exists that the defects can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) While the FAC does suggest an ability to amend the fifth cause of action, there is no suggestion that the fourth cause of action may be amended. As such, the demurrer is sustained with leave as to the fifth cause of action for negligent misrepresentation. The demurrer is sustained without leave as to the fourth cause of action for professional negligence.

The court notes that the Plaintiffs submitted a second amended complaint to the court to be filed prior to the hearing on the demurrer. While each party may amend a pleading once as a matter of right, any other amended pleading requires leave of court. (CCP §472; *Woo v. Superior Court* (1999) 75 Cal.App.4th 169, 175.) In light of the court’s ruling on the demurrer, the court is instructed to return the proposed second amended complaint unfiled.

Any second amended complaint shall be filed and served on or before April 20, 2012.

23. S-CV-0030686**Saeed, Farrukh, et al vs. HSBC Bank USA, et al**

Defendant Keller Williams' Motion to Expunge Lis Pendens is granted. As an initial matter, the court notes that the Notice of Lis Pendens has not been filed with the court as required pursuant to CCP§405.22, which subjects the notice to being void and invalid under CCP§405.23. Further, Plaintiffs' assertion that the moving Defendant does not have standing to bring the current motion is not well taken. CCP§405.30 allows a party or nonparty with an interest in the real property to apply to expunge a notice of lis pendens. The Plaintiffs do not cite to any legal authority to support the proposition that a monetary interest in the property is insufficient for the moving Defendant to bring such a motion under the statute.

Plaintiffs fail to show, by a preponderance of the evidence, the probable validity of their claim to the real property. Falk's February 10, 2012 email states that Defendant HSBC was soliciting multiple offers from various buyers. (Ahmad Declaration, Exhibit C.) The email does not suggest the Plaintiffs were receiving any priority in the bidding process or that their counter offer was the only one being considered by Defendant HSBC. The response of Plaintiffs' agent supports that the counter offer was not a finalization of the sale as he comments, "I hope we can make this work". (Ahmad Declaration, Exhibit D.) Moreover, Mr. Ahmad's follow up telephone call did not confirm that Defendant Falk had accepted the counter offer as the finalization of the sale between the parties. Mr. Ahmad states that Falk only acknowledged receiving the email and that it would be sent to Defendant HSBC. (Ahmad Declaration, ¶7.) As such, Plaintiffs have failed to meet their burden and the notice of lis pendens is expunged.

If oral argument is requested, Defendants' request for telephonic appearance is granted. The court will contact counsel at the time the matter is called for hearing.

24. S-CV-0030730**Eureka Ridge, LLC vs. First American Title Ins Co**

Plaintiffs' Motion for Preliminary Injunction is denied.

Defendants' Objection No. 1 is overruled. Defendants' Objection No. 2 is sustained.

Defendants' request for judicial notice is granted pursuant to Evidence Code §452.

When determining whether to issue a preliminary injunction, the court weighs the likelihood of whether the moving party will prevail on the merits and the relative interim harm to the parties from the issuance or non-issuance of the injunction. (*Hunt v. Superior Court* (1999) 21 Cal.4th 983, 999-1000.) The ruling is within the sound discretion of the trial court. (*Ibid.*) Plaintiffs have failed to establish a likelihood that they will prevail on any of the four causes of action asserted in their first amended complaint. Furthermore, Plaintiffs fail to show an ability to tender the outstanding amount due to the Defendants. The requirement to pay the secured debt is necessary even when the debt is unenforceable. (*Mix v. Sodd* (1981) 126 Cal.App.3d 386, 390.) As such, the preliminary injunction is denied and the temporary restraining orders issued by the court on March 2, 2012 are dissolved.

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